Supreme Court, U.S.
FILED

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

DAVID ROSE,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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78 pp

## QUESTION PRESENTED FOR REVIEW

WHETHER A SEIZURE AND SUBSEQUENT SEARCH OF A VEHICLE WITHOUT PROBABLE CAUSE AND IN VIOLATION OF THE ESTABLISHED LAW AND POLICE STANDARDS AND PROCEDURES IS UNREASONABLE WITHIN THE MEANING OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

## TABLE OF CONTENTS


| | Page No. |
|---|---|
| QUESTION PRESENTED FOR REVIEW ------ | 01 |
| PROCEEDINGS BELOW ---------- | 05 |
| JURISDICTION ---------- | 05 |
| CONSITUTIONAL PROVISION AND STATUTES INVOLVED ---------- | 06 |
| STATEMENT OF THE CASE ---------- | 09 |
| The Facts ---------- | 11 |
| REASONS FOR GRANTING THE WRIT ------ | 20 |
| APPENDIX ---------- | APP - 1 |

## TABLE OF AUTHORITIES

**Cases:**


| | Page No. |
|---|---|
| Bertine v. Colorado, 479 U.S. 367; 93 L.Ed.2d 739; 107 S.Ct. 738 (1987); | 21, 24, 25, 34 |
| Cady v. Dombroski, 413 U.S. 433; 37 L.Ed.2d 706; 93 S.Ct. 2523 (1973); | 21, 36 |
| Drinkard v. State, 584 S.W.2d 650 (TN 1979); | 21 |
| Harris v. U.S., 390 U.S. 234; 19 L.Ed.2d 1067; 88 S.Ct. 992 (1968); | 21 |
| Illinois v. Lafayette, 462 U.S. 640; 77 L.Ed.2d 65; 103 S.Ct. 2605 (1983); | 28 |
| Schneckloth v. Bustamonte, 412 U.S. 218; 36 L.Ed.2d 854; 93 S.Ct. 2041 (1973) | 35 |
| South Dakota v. Opperman, 428 U.S. 364; 49 L.Ed.2d 1000; 96 S.Ct. 3092 (1976) | 21, 22, 23, 24, 25 |
| U.S. v. Rodriques-Morales, 929 F.2d 780 (1st Cir. 1991) | 36 |

**Nonjudicial Authorities:**


| | Page No. |
|---|---|
| U. S. CONST. amend. IV; ---------- | 06 |
| 18 U.S.C. § 922; ---------- | 06, 09 |
| ---------- | 10 |
| 18 U.S.C. § 924; ---------- | 07, 09 |
| ---------- | 10 |
| 21 U.S.C. § 841; ---------- | 07, 09 |
| 28 U.S.C. § 1254(1); ---------- | 05 |

## PROCEEDINGS BELOW

The opinion of the Court of Appeals on the appeal is attached hereto as Exhibit "A". The opinion of the United States District Court for the Middle District of Tennessee is attached hereto as Exhibit "B".

## JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on the 29th day of December, 1993. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment to the United States Constitution.

> The right of the people to be secure in their persons, houses, papers and affects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. IV.

**18 U.S.C. § 922. Unlawful acts**

> (g) It shall be unlawful for any person--
>
> > (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
> >
> > to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has

been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(1).

**21 U.S.C. § 841. Prohibited acts A**

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 U.S.C. § 841(a)(1)

**18 U.S.C. § 924. Penalties**

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of

violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barrelled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer of firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

18 U.S.C. § 924 (c)(1)

## STATEMENT OF THE CASE

The appellant was indicted on the 18th day of June, 1992, in a six-count indictment in the Middle District of Tennessee (R. 1: Indictment), charging the appellant as follows:

Count I. Felon in Possession of Firearms. 18 U.S.C. 922(g)(1) and 924.

Count II. Felon in Possession of a Firearm. 18 U.S.C. 922(g)(1) and 924.

Count III. Possession with Intent to Distribute a Schedule II Controlled Substance. 21 U.S.C. 841(a)(1).

Count IV. Use or Carrying a Firearm in Commission of a Felony. 18 U.S.C. 924(c)(1).

Count V. Use or Carrying a Firearm in Commission of a Felony. 18 U.S.C. 924(c)(1).

Count VI. Possession of a Firearm with Seriel Numbers Removed. 18 U.S.C. 922(k) and 924(a)(i)(1)(B).

A written plea of "Not Guilty" was entered by the appellant on October 14, 1992. A timely notice to suppress was filed by the appellant on November 17, 1992, which was heard on November 24, 1992, and on December 4, 1992, the Court entered an order overruling the motion to suppress (Exhibit "B"). On December 21, 1992, the appellant filed a petition under Rule 11(a)(2), Federal Rules of Criminal Procedure, to enter a conditional plea of guilty to Counts I, III and IV, reserving his right to appeal the Court's order overruling his motion to suppress. A Judgment and Committal was entered by the Court on February 22, 1993, granting the motion to enter the plea of guilty to Counts I, III and IV and sentencing the

appellant to confinement in accordance with the guidelines. On February 24, 1993, the appellant filed his Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. Following briefing and oral argument, an order was entered by the Court of Appeals for the Sixth Circuit on the 29th day of December, 1993, affirming the decision of the trial court.

The Facts:

At approximately 8:00 p.m. on the 20th of February, 1991, Officer Danny Driskell heard a report over his radio of a domestic disturbance at the South Shore Restaurant in Donelson, Davidson County, Tennessee. He was within a block of the area so he responded to the call (Danny Driskell at TR 2, 3).

When he arrived at the scene the manager told him that an individual had struck a woman in the restaurant and

pointed out a car leaving the parking area as being driven by the person who hit the woman (Danny Driskell at TR 4). Officer Driskell followed the car and stopped it in an area of the shopping center separate from where the restaurant was located. The car was being driven by the appellant, David Rose (Danny Driskell at TR 5). Driskell used his blue lights in making the stop (Danny Driskell at TR 35). Driskell frisked the appellant for weapons and placed him in the lockup area in the rear of the patrol car (Danny Driskell at TR 35). Rose believed he was under arrest (David Rose at TR 80). Driskell then drove back to the front of the South Shore Restaurant and left Rose locked up in the rear while he went into the restaurant to interview Diane White, the alleged victim (Danny Driskell at TR 39, 40).

Driskell came back outside to his car and through his radio ran a records check on Rose. Driskell found from the records check that Mr. Rose had an outstanding warrant on file for driving under the influence and also had a lengthy criminal record (Danny Driskell at TR 8, 9). Driskell advised Rose of his rights and placed him under arrest on the outstanding DUI and for violation of the restricted driver's license law (Danny Driskell at TR 9). Shortly thereafter, Driskell arrested Rose on the domestic violence charge (Danny Driskell at TR 10). All of the charges were misdemeanors (David Rose at TR 90) for which Rose could have made bond (David Rose at TR 90).

On the date of the arrest, police General Order 83-2 was in effect (Danny Driskell at TR 69, 70). Paragraph 1 of the General Order says:

I. PURPOSE:
The purpose of this order is to inform members of current departmental policy and the most recent developments attending vehicle impoundment. The order will serve to standardize procedures and will (emphasis supplied) be observed by all members involved in the impoundment of vehicles.

(EX #7).

Paragraph 2 of General Order states:

II. DEPARTMENT POLICY:
It shall be the policy of the Department that if (emphasis in original) impoundment of the vehicle is not absolutely necessary to expedite a member's enforcement/investigative action it shall not (emphasis in original) be impounded. To the contrary, if (emphasis in original) the circumstances which bring the vehicle to the attention of the member in the first place are such that the owner/operator, even though arrested, is able to make his own "arrangements" for custody of the vehicle, of (sic) if (emphasis in original) the vehicle can be parked and locked without obstructing traffic or endangering the public, the member shall permit such action to be taken rather than impound the vehicle. Any "alternative"

to impoundment will require completion of MPD Form 233 "Vehicle No-Tow Request & Liability of Release Report", which must be signed by the owner/operator of the vehicle.

Form 233 was attached to the back of the Order. (EX #7.) In that form the following provision for describing the vehicle was:

> I, THE UNDERSIGNED, REQUEST THAT THE VEHICLE NOT BE REMOVED TO THE METROPOLITAN TOW-IN LOT FOR SAFE KEEPING. INSTEAD, AS THE OWNER AND/OR OPERATOR OF THE VEHICLE, I DO HEREBY AUTHORIZE/REQUEST THAT THE VEHICLE BE:
>
> _____(1) left parked/secured at the location where the police action occurred, wherein I will be responsible for its safekeeping;
>
> _____(2) remanded to the custody of _____ wherein he/she will be responsible for its safekeeping.
>
> WITH VISIBLE INVENTORY AND/OR DAMAGE AS FOLLOWS: _____
> _____
> _____.
>
> IN CONSIDERATION FOR COMPLIANCE WITH THE ABOVE REQUEST, I HEREBY

RELEASE THE METROPOLITAN GOVERNMENT AND MEMBER(s) OF THE METROPOLITAN POLICE DEPARTMENT

___ FROM ANY LIABILITY FOR POSSIBLE LOSS OF, OR DAMAGE TO, THE VEHICLE AND PROPERTY THEREIN.

I hereby acknowledge that I have read and understand the contents of this report.

_____

SIGNATURE OF VEHICLE OWNER/OPERATOR

_____

DATE & TIME

The form has a space at the end for the police officer to explain why he has not complied with the request (EX #7).

The vehicle at that time was in the shopping center parking area and was not in any way obstructing traffic (Danny Driskell at TR 32, 33). Furthermore, the shopping center, including the area where the car was parked, was not in a high crime area and was well lit (Danny Driskell at TR 68).

Mr. Rose knew that if the car were towed it would be searched and the contraband would likely be found, and he did not want the car searched (David Rose at TR 85). Appellant was never told and he had no idea that he had any option other than to have the car towed (David Rose at TR 87). Driskell never advised Rose that he could either leave the car or call someone to pick it up. Several people could have picked up the car, including his sister, who was in the courtroom at the time of the hearing (David Rose at TR 87, 88).

Rose asked Driskell if he could follow him downtown in his car and Driskell refused (Danny Driskell at TR 11). Rose then gave his keys to Driskell and asked him to give them to Diane White and let her drive the car home (David Rose at TR 84.) Driskell claimed he refused because Diane

White seemed to him to be either upset or inebriated. There was a dispute in testimony as to what happened next. Driskell claimed that Mr. Rose became upset or argumentative and said that "if anything is taken out of the car I will hold you responsible." Rose stated that he did not say anything at that time but did make a similar statement after the car had been searched (Danny Driskell at TR 12) (David Rose at TR 88, 89). This conversation was, according to Driskell, when Rose and Driskell were driving back to where the appellant's car was parked, after Rose was arrested on the final charge (Danny Driskell at TR 12). Driskell then left Rose in the rear of the patrol car and searched the passanger compartment of Rose's car, where he found no contraband (Danny Driskell at TR 15). Driskell then took the key which he received from Rose

earlier and without further consent opened the trunk and searched it. Inside the trunk he found a black satchel, inside of which were two firearms and the cocaine, which are the subject of Rose's conviction (Danny Driskell at TR 15, 16).

When Driskell made his initial reports at the police station, the justification for the search was that it was incident to arrest (EX #'s 4, 5, 6) and no mention was made to an inventory until much later. In none of the police reports, narrative summary or affidavits was any mention made concerning Driskell's claim that Rose would hold the police responsible for any missing items. (EX #'s 4, 5, 6) (Danny Driskell at TR 59). Driskell's claim that this statement was the purpose for the seizure was first stated in Driskell's testimony at the motion to suppress on November 24, 1992 (Danny Driskell at TR 57).

## REASONS FOR GRANTING THE WRIT

The trial court and the Court of Appeals incorrectly held that a seizure and subsequent search by a police officer without probable cause and in violation of established state law and police procedures and criteria did not violate the reasonableness clause of the Fourth Amendment to the United States Constitution. The Court of Appeals for the Sixth Circuit, in its decision, departed from the well established law as set down by this Court relating to warrantless search of automobiles.

It was conceded by the government in the proceedings below that no probable cause existed for the search of the petitioner's vehicle. The government argued that the search fell within an exception to the warrant requirement

because the seizure and subsequent search was for inventory purposes.

While numerous decisions have discussed inventory searches, most, if not all, have addressed the propriety of the inventory after a valid seizure.[1] The facts of this case are somewhat different. The seizure of the vehicle preceding the search was without probable cause and in violation of both established state law[2] and established and published police procedure.

In conducting inventory searches, the police officer is relieved of the probable

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1

Harris v. U.S., 390 U.S. 234, 19 L.Ed.2d 1067; 88 S.Ct. 992 (1968); Cady v. Dombrowski, 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973); South Dakota v. Opperman, 428 U.S. 364, 49 L.Ed.2d 1000; 96 S.Ct. 3092 (1976); Bertine v. Colorado, 479 U.S. 367; 93 L.Ed.2d 739; 107 S.Ct. 738 (1976).

2.

Drinkard v. State, 584 S.W.2d 650 (TN 1979).

cause standard typical of the usual criminal search. Whether a warrantless "inventory" search is constitutionally permissible is determined by the general standard of "reasonableness". South Dakota v. Opperman, 428 U.S. 364; 49 L.Ed.2d 1000; 96 S.Ct. 3092 (1976).

This Court has held that warrantless inventory searches may be allowable without probable cause, if the search is necessary to protect specific interests of both the police and the car owner. In such situations, these needs outweigh the defendant's constitutional right to be free from warrantless police intrusion into the vehicle.

> [T]hree interests generally have been advanced in support of inventory searches: (i) protection of the police from danger; (ii) protection of the police against claims and disputes over lost or stolen property; and (iii) protection of the owner's property while it

remains in police custody.

South Dakota v. Opperman, 428 U.S. 364, 378; 49 L.Ed.2d 1000, 1010; 96 S.Ct. 3092 (1976). Powell concurring.

These interests, however, do not negate the powerful commands of the Fourth Amendment. As Justice Powell stated in his concurring opinion:

> Against these interests must be weighed the citizen's interest in the privacy of the contents of his automobile. Although the expectation of privacy in an automobile is significantly less than the traditional expectation of privacy associated with the home (citations omitted) the unrestrained search of an automobile and its contents would constitute a serious intrusion upon the privacy of the individual in many circumstances.

Opperman, 428, U.S. 364 at 379 and 380; 49 L.Ed.2d 1000 at 1001; 96 S.Ct. 3092 at 3102.

Because the search of a vehicle in an inventory search is without a warrant and because it is not subject to the probable cause standard of the second sentence of

the Fourth Amendment, this Court has consistently insisted on strict adherance to standardized procedure.

> Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria.

Bertine v. Colorado, 479 U.S. 367, 374; 93 L.Ed.2d 739, 747; 107 S.Ct. 738, 742 (1976) n 6.[3]

So important is the requirement that the police officer adhere strictly to standardized procedures, three justices in Bertine wrote separately from the plurality opinion to emphasize that importance:

> I join the Court's opinion, but write separately to underscore

---

3

See also for example in South Dakota v. Opperman, 428 U.S. 364, 375, 376; 49 L.Ed.2d 1000, 1008; 96 S.Ct. 3092, 3100 (1976) where the Court pointed out "[the] protective search was carried out in accordance with standard procedure...a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function."

> the importance of having such inventories conducted only pursuant to standardized police procedures. The underlying rationale for allowing an inventory exception to the Fourth Amendment warrant rule is that police officers are not vested with discretion to determine the scope of the inventory search. See South Dakota v. Opperman. This absence of discretion ensures that inventory searches will not be used as a purposeful and general means of discovering evidence of a crime.

Bertine v. Colorado, 479 U.S. 367, 376; 93 L.Ed.2d 739, 748, 749; 107 S.Ct. 738, 743 (1987). Blackman concurring.

If the inventory justification is to apply as an exception to the warrant requirement for searches, then adherence to strict procedures is no less important when the inventory exception is used to justify a seizure. Of the three interests which Opperman lists as justification for an inventory exception to the warrant requirement, the only one applicable in the case now before the Court is the second.

"Protection of the police against claims over lost or stolen property". It was this purpose that the officer asserted as justification for the warrantless seizure and search.

> He (Rose) said, Anything's taken out of that car, I'm going to hold you and the police department responsible for anything that's lost or stolen from my car...at that point I informed him since he was going to hold me responsible, that I would tow the vehicle...

(Driskel at TR 12).

At the time of the seizure of Rose's vehicle the Metropolitan Police Department General Order 83-2 was in effect and it established clearly defined procedures for seizure of vehicles when probable cause was not an issue. The officer was required to follow these orders explicitly. The language of the General Order makes it clear that the police officer must follow

its mandate or explain in writing the reason for departure (EX #7). The language of those instructions is so clear and cogent that it bears repeating:

> This order will serve to standardize procedure and will be observed by all members involved in the impoundment of vehicles.
>
> It shall be the policy of the Department that if impoundment of vehicle is not absolutely necessary to expedite a member's enforcement/investigative action it shall not be impounded. To the contrary, the circumstances which bring the vehicle to the attention of the member in the first place are such that the owner/operator even though arrested is able to make his own "arragnements" for custody of the vehicle or if the vehicle can be parked and locked without obstructing traffic or endangering the public, the member shall permit such action to be taken rather than impound the vehicle." (The emphases are in the original).

This policy could not be clearer and the police officer in this case knew and was fully aware of the policy at the time

that he impounded the vehicle. (Driskell TR 13).

The Nashville Metropolitan Police Department, which was in the best position to know, had decided that this policy was the best way to address its caretaking function and the Court should not second guess those procedures.

> We are hardly in a position to second-guess police departments as to what practical administrative method will best deter theft...and false claims...

Illinois v. Lafayette, 462 U.S. 640, 648; 77 L.Ed.2d 65, 72; 103 S.Ct. 2605, 2610 (1983).

If we are to believe the officer's concern that Rose would hold him responsible for anything in the vehicle being lost, then that concern was well protected by this policy. It provided a simple solution to the officer's supposed concern without violating appellant's rights under the Fourth Amendment. The

policy was clear: Impound only in extraordinary circumstances after explaining to the owner his options.

As a further part of this order a release form which was attached which was to be presented to the owner/operator of the vehicle to provide an alternative to towing (Form 233, EX #7). This waiver, the pertinent part which follows, gives the owner two clear alternatives to impoundment.

> I, THE UNDERSIGNED, REQUEST THAT THE VEHICLE NOT BE REMOVED TO THE METROPOLITAN TOW-IN LOT FOR SAFE KEEPING. INSTEAD, AS THE OWNER AND/OR OPERATOR OF THE VEHICLE, I DO HEREBY AUTHORIZE/REQUEST THAT THE VEHICLE BE:
>
> _____(1) left parked/secured at the location where the police action occurred, wherein I will be responsible for its safekeeping;
>
> _____(2) remanded to the custody of _____ wherein he/she will be responsible for its safekeeping.

WITH VISIBLE INVENTORY AND/OR DAMAGE AS FOLLOWS: _____

_____

_____.

IN CONSIDERATION FOR COMPLIANCE WITH THE ABOVE REQUEST, I HEREBY RELEASE THE METROPOLITAN GOVERNMENT AND MEMBER(s) OF THE METROPOLITAN POLICE DEPARTMENT

_____

___ FROM ANY LIABILITY FOR POSSIBLE LOSS OF, OR DAMAGE TO, THE VEHICLE AND PROPERTY THEREIN.

I hereby acknowledge that I have read and understand the contents of this report.

_____

SIGNATURE OF VEHICLE OWNER/OPERATOR

_____

DATE & TIME

By presenting this form to Rose, the officer would have been relieved of any liability that he arguably might have had for any missing property. All the officer had to do, if he were concerned about being charged with loss of property, was comply with the General Order and advise Rose that

he had the right to leave the property parked in the parking lot rather than have it towed. If Rose had refused the options of Form 233, then impoundment could arguably have been justified.

This form further provides at its bottom a place where the officer is required to explain in writing why the officer did not comply with the Order. This is further evidence of the seriousness of the Department's desire that the officer comply with procedure. The fact that the officer did not follow procedure and write out his reasons for not following orders is further evidence of his violation of established procedure. It is also evidence that the officer's claim that the seizure was for inventory purposes was a sham.

There was no immediate danger to the police, the public or the owner of the vehicle. The vehicle was not blocking

traffic and was in a well-lit area (Danny Driskell at TR 68). The officer agreed that no one had complained of the car being parked where it was. When Rose was arrested, he was charged only with misdemeanors and very likely could have made bond and in a short time picked up his car (David Rose at TR 90). Furthermore, according to the officer, at the time he decided to seize and search the vehicle, Rose was calm and no longer "upset". The officer could have then easily explained to Rose his options (Driskell at TR 12).

The fact that the officer didn't mention until much later the allegation that Rose would hold him responsible for lost property and asserted from the beginning in all his written reports that he was conducting a search incident to arrest, indicates he had no real concern about appellant's claim (Danny Driskell at

TR 57, TR 59, TR 67, TR 68; EX #'s 4, 5 and 6).

Most facts in this case are not in dispute. First, the appellant knew that he had contraband in the car and knew the car would be searched if it were towed. He did not want the car towed and would have accepted any alternative offered him by the police David Rose at TR 85). The car was in a well lit parking area and was not obstructing traffic (Danny Driskell at TR 32, TR 68, TR 69).

The officer had no probable cause to search and no reason to impound the car. We can easily surmise that the officer, who was an experienced training officer with the rank of corporal (Danny Driskell at TR 33), knowing Rose was a person with a lengthy record, suspected that Rose had contraband of some nature in the vehicle. By concealing from Mr. Rose the rights that

he had concerning leaving his vehicle, the officer provided himself a pretext to conduct a warrantless and a "purposeful and general means of discovering evidence of a crime". Bertine v. Colorado, supra.

The Government argued that when Rose made no further requests after his first two requests were refused by Driskell, Driskell was then justified in impounding the vehicle. Rose, however, had no knowledge that under General Order 83-2 he did not have to permit the car to be impounded and had the options of either having someone else pick the vehicle up or leaving it parked (David Rose at TR 87, TR 88). The General Order clearly anticipated that any owner or operator of a vehicle would be made aware of his options. It was for that reason that Form 233 was furnished to the officers.

Only the officer, and not petitioner,

had full knowledge of Rose's rights under the General Order 83-2. The officer knowingly refused to comply with that Order and advise Rose of his options. This is a fact which this Court should consider in determining whether the seizure and subsequent search was unreasonable. Schneckloth v. Bustamonte, 412 U.S. 218: 36 L.Ed.2d 854: 93 S.Ct. 2041 (1973).

The officer had initially sought to justify the search of Rose's car claiming it was "incident to arrest". This argument, for obvious reasons, was abandoned and at the hearing the Government relied entirely upon the inventory exception to the warrant requirement. The Government's argument was based entirely on the premise that the police officer had no reasonable option but to tow the vehicle.

Impoundment and inventory searches have been justified as a necessary part of

the police's "community caretaking function". Cady v. Dombroski, 413 U.S. 433; 37 L.Ed.2d 706; 93 S.Ct. 2523 (1973). The justification for an inventory exception to the warrant requirement is the occurrence of an unexpected incident which requires the police to take on-the-spot action. As stated in U.S. v. Rodriques-Morales, cited by the Government in its brief to the Court of Appeals:

> [T]he need for police to function as community caretakers arises fortuitously when unexpected circumstances present some transient hazard which must be dealt with on the spot.

U.S. v. Rodriques-Morales, 929 F.2d 780, 787 (1st Cir. 1991).

The thread running through the inventory search cases which allows an avoidance of the Fourth Amendment probable cause requirements, is the necessity, because of an unexpected hazard, for the police to take some action, i.e., either

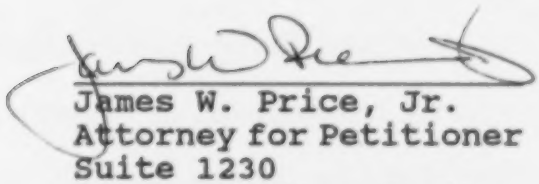
impoundment or allowing the driver to move or make arrangements for moving the vehicle.

The facts, however, are to the contrary. There was a clearly established standardized procedure which provided reasonable alternatives to seizure. Not only were these procedures available, they were mandatory. The only reasonable conclusion which can be drawn is that the officer purposefully elected to ignore the established police procedure and embark on an illegal general search for evidence of an unspecified crime. It is this type of search which is prohibited by the Fourth Amendment.

If the opinion of the Court of Appeals is undisturbed, this Court will have abandoned its requirement that the police

adhere to standardized procedure and there will be no check on overzealous police officers.

Respectfully submitted,



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## C E R T I F I C A T E

I certify that I have placed a three (3) true and exact copies of the foregoing corrected Petition for Writ of Certiorari in the United States Mails, postage prepaid, addressed to each of the following:

The Solicitor General
Department of Justice
Washington, D. C. 20530

Mr. John Roberts
United States Attorney
Middle District of Tennessee
110 Ninth Avenue, South
Suite A-961
Nashville, TN 37203-3870

This 6th day of April, 1994.

James W. Price, Jr.

NO.

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

**October Term, 1993**

DAVID ROSE,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

**PETITION FOR WRIT OF CERTIORARI**
**TO THE UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**APPENDIX**

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Attorney for the Petitioner

**EXHIBIT 'A'**

**No. 93-5302**

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

| | |
|---|---|
| UNITED STATES OF AMERICA, | ) |
| | ) |
| Plaintiff-Appellee, | ) |
| | )ON APPEAL FROM |
| vs. | )THE UNITED |
| | )STATES DISTRICT |
| DAVID ROSE, | )COURT FOR THE |
| | )MIDDLE DISTRICT |
| Defendant-Appellant | )OF TENNESSEE |

Decided and Filed _____

**BEFORE:** **NELSON** and **NORRIS**, Circuit Judges, and **HEYBURN**, District Judge.[1]

**PER CURIAM.** This is an appeal from a conviction on cocaine and firearms charges. The issue presented is whether the seizure by the police of an automobile that proved

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[1] The Honorable John G. Heyburn II, United States District Judge for the Western District of Kentucky, sitting by designation.

to contain guns and drugs belonging to the defendant was "unreasonable" within the meaning of that term as used in the Fourth Amendment of the United States Constitution. Concluding that the seizure was not unreasonable, we shall affirm the conviction.

I

On February 20, 1991, the defendant, David Rose, had dinner with his girlfriend, Rita White, at a restaurant in a shopping center in a suburb of Nashville, Tennessee. The couple had an argument in the course of which Mr. Rose grabbed Ms. White and struck her. The restaurant manager reported the incident to the local authorities by telephone.

Nashville Metropoliton Police Office (sic) Danny Driskell responded to the call

and stopped Mr. Rose as he was about to drive out of the shopping center parking lot. Mr. Rose presented a restricted driver's license and admitted that he did not have the "restriction papers" that holders of such licenses are required to carry in order to drive legally. A radio check disclosed that Mr. Rose was a convicted felon with a long criminal record and was the subject of an outstanding warrant for driving under the influence of alcohol.

Officer Driskell placed Mr. Rose under arrest pursuant to the outstanding warrant and for driving without the necessary papers. Upon ascertaining that Ms. White (who had remained in the restaurant) was in fear of her life, Officer Driskell told Mr. Rose that he would also be booked for domestic violence.

Mr. Rose asked to be allowed to drive

himself to the police station booking room in his own car. He told Officer Driskell that he had some very important papers and valuables in the vehicle and did not want to have any of his property lost; the implication was that Rose did not want the car to be left at the shopping center unattended.

The officer refused to let Mr. Rose drive, pointing out that it would be illegal for Rose to do so without an unrestricted license. Rose then handed his car keys to Officer Driskell and asked him to give the keys to Ms. White so that she could drive the vehicle home. The officer went back into the restaurant to see if Ms. White was up to such a task. After speaking with her, he decided that she was not; Ms. White appeared intoxicated, as the officer subsequently testified, and she seemed to upset to drive safely.

Officer Driskell then told Mr. Rose that the police would tow his car to a fenced-in and secured impound lot. Mr. Rose became upset at this point, and he threatened to sue the officer and the police department if anything were lost or stolen from the car.

General Order 83-2 of the Nashville Metropolitan Police Department, which deals with the subject of vehicle impoundment, says that an arrested person's vehicle shall not be impounded unless absolutely necessary to expedite law enforcement/investigative action. If the owner/operator of a vehicle can make his own arrangements for custody of the vehicle, the order goes on to say, or if the vehicle can be safely parked and locked, one of these alternatives will be followed and a prescribed form (Form 233) will be completed and signed by the

owner/operator. The form contains sections in which an owner/operator can make a written request either that the vehicle be left at the scene or that it be "remanded" to a named custodian. The form includes a release of liability for loss or damage to the vehicle and its contents. Officer Driskell did not mention Form 233 to Mr. Rose, and did not press him to say whether he wanted the car left at the shopping center despite his concern for the safety of his papers and valuables.

Following the determination that neither Mr. Rose nor Ms. White would be allowed to drive the car away from the parking lot, and having decided to proceed with impoundment rather than leaving the car unattended, Officer Driskell made an inventory of the contents of the car. It is undisputed that departmental guidelines call for such an inventory whenever a

vehicle is to be impounded.

In the course of making his inventory, the officer discovered a number of bags of cocaine, two firearms, and notebooks thought to be related to criminal activity. The discovery of these materials led to a six-count indictment being returned against Mr. Rose by a federal grand jury.

Mr. Rose filed a motion to suppress the articles taken from the car, and the district court (Higgins, J.) held an evidentiary hearing on the motion. After considering the evidence presented at the hearing, and after weighing the credibility of the two witnesses who testified, Officer Driskell and Mr. Rose, the court entered an order denying the suppression motion. The order was supported by a memorandum containing detailed findings of fact and an extensive discussion of the applicable law.

Reserving the right to appellate

review of the denial of his motion to suppress, Mr. Rose subsequently entered a conditional plea of guilty to three of the six counts against him. (See Rule 11(a)(2), Fed.R.Crim.P., which authorizes such a procedure.) The remaining counts were dismissed. The district court entered a judgment of conviction in February of 1993, and this appeal followed.

II

We must accept Judge Higgins' factual findings as true except insofar as they may be shown to have been clearly erroneous. United States v. Garcia, 866 F.2d 147, 151 (6th Cir. 1989); United States v. Coleman, 628 F.2d 961, 963 (6th Cir. 1980). The reasonableness of the seizure and search of the car, on the other hand, is ultimately a question of law; as such, it is subject to

de novo review. See United States v. Corral, 970 F.2d 719, 723 (10th Cir. 1992); United States v. Colin, 928 F.2d 676, 677-78 (5th Cir. 1991).

None of the factual findings made by Judge Higgins is clearly erroneous. Mr. Rose does not challenge the right of the police to conduct an inventory search of a properly impounded car, moreover, so the only question left is whether Officer Driskell acted reasonably or unreasonably, in a constitutional sense, when he chose to seize the car.

Where police officers who inventory the contents of an automobile for impoundment purposes follow standardized procedures and do not act in bad faith or for the sole purpose of investigating criminal conduct, it is well established that the search can pass constitutional muster notwithstanding the absence of a

search warrant based on probable cause. See Colorado v. Bertine, 479 U.S. 367, 371-73 (1987), and the cases there cited. The fact that a driver has not been invited to make his own arrangements for the safekeeping of his property is not dispositive of the constitutional issue:

> "[T]he real question is not what 'could have been achieved,' but whether the Fourth Amendment requires such steps...
>
> "The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." Id. at 374, quoting Illinois v. Lafayette, 462 U.S. 640, 647 (1983) (emphasis in original).

Under the facts of the case at bar, we do not believe that it was unreasonable for Officer Driskell to have decided on impoundment without first having invited Mr. Rose to sign a Form 233. Given Mr. Rose's expression of concern about the

security of the valuables in his car, it was not unreasonable for the officer to decide against leaving the car at the shopping center for an indeterminate period of time. The alternative arrangements proposed by Mr. Rose were rejected for perfectly legitimate reasons, and we believe that the officer was justified in concluding that impoundment was necessary. The policy embodied in General Order 1983-2 rules out impoundment if acceptable alternative arrangements are available, but not otherwise -- and only where there is an acceptable alternative to impoundment does the General Order require completion of Form 233.

The General Order was not drafted to deal specifically with the nuances of every conceivable fact pattern. As part of what the Supreme Court has called "community caretaking functions," and in the interests

of public safety, police officers frequently assume custody of automobiles. South Dakota v. Opperman, 428 U.S. 364, 368 (1976), quoting Cady v. Dombrowski, 413 U.S. 433, 441 (1973). The factual circumstances will vary from case to case, and as the district court pointed out, quoting United States v. Rodriguez-Morales, 929 F.2d 780, 787 (1st Cir. 1991), cert. denied, 112 S.Ct. 868 (1992), "[t]he police cannot sensibly be expected to have developed, in advance, standard protocols running the entire gamut of possible eventualities." The Nashville Metropolitan Police protocol permits impoundment of automobiles, in general terms, when circumstances require it. Officer Driskell's application of the protocol was not patently unreasonable, and the district court was not obligated to find, on this record, that the officer decided on

impoundment solely because he wanted to search for evidence of criminal conduct.

Finding no error in the denial of Mr. Rose's motion to suppress, we **AFFIRM** the conviction.

**EXHIBIT "B"**

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

| | | |
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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| vs. | ) | No. 3-92-00083 |
| | ) | Judge Higgins |
| DAVID ROSE | ) | |

**O R D E R**

In accordance with the memorandum contemporaneously entered, the defendant's motion (filed November 17, 1992; Docket Entry No. 12) to suppress is denied.

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge
12-4-92/

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
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| DAVID ROSE | ) | |

M E M O R A N D U M

The Court has before it the defendant's motion (filed November 17, 1992; Docket Entry No. 12) to suppress and the government's response (filed November 19, 1992; Docket Entry No. 16).

For the reasons set forth below, the Court denies the defendant's motion.

Background

The defendant, David Rose, is charged by way of indictment (filed June 17, 1992; Docket Entry No. 1) with violating federal firearms and narcotics trafficking statutes. In his motion to suppress, the defendant alleges that members of the

Metropolitan Police Department of Nashville and Davidson County, Tennessee, seized from his automobile the firearms and narcotics that are the basis of the indictment, in violation of his rights under the Fourth Amendment to the United States Constitution.

On November 24, 1992, the Court held an evidentiary hearing on this matter. The only witnesses to testify were the defendant and Danny Driskell, a Metropolitan Police officer who participated in the search of the defendant's car. The testimony of the two witnesses was inconsistent in certain respects. However, after observing the witnesses on the stand and considering all the evidence presented at the hearing, the Court has made the following findings of fact.

## Findings of Fact

On February 20, 1991, the defendant, David Rose, was dining with his fiancee, Rita Diane White, in the South Shore Restaurant, which is located in a suburban shopping center in Nashville, Tennessee. During the course of their meal, the two began to argue, and Mr. Rose grabbed Ms. White and struck her. The restaurant manager called the Metropolitan Police to report the incident.

A Metropolitan Police officer, Danny Driskell, was on patrol nearby when he heard a radio report of a domestic disturbance at the South Shore Restaurant. He immediately drove to the restaurant and was met outside by the restaurant manager. The manager pointed to a car that was just pulling out of a parking space beside the restaurant and told Officer Driskell that its driver had struck a woman inside.

Officer Driskell followed the car as it drove behind the shopping center, and, after turning on his flashing lights, succeeded in causing the driver, David Rose, to stop at the opposite end of the shopping center parking lot. Mr. Rose's car was still on the parking lot when he stopped. It was not obstructing traffic.

Officer Driskell did not arrest Mr. Rose, but, after frisking him for weapons and determining that Mr. Rose was unarmed, asked Mr. Rose if he would come with him back to the restaurant. Mr. Rose agreed, and Officer Driskell drove Mr. Rose back to the restaurant in the back of his patrol car.

Leaving Mr. Rose in the back of the patrol car, Officer Driskell went inside the restaurant to investigate. Several witnesses told him that Mr. Rose had hit Ms. White. By this time two more Metro

Police officers had also arrived at the scene, and Officer Driskell left them to continue the investigation while he returned to Mr. Rose outside.

Officer Driskell then asked Mr. Rose for his driver's license and proceeded to run a records check on his police radio. Officer Driskell also noticed that the license had a mark on it indicating that it was restricted. When he asked Mr. Rose whether he possessed the papers that holders of restricted licenses are required by Tennessee law to carry when they drive, Mr. Rose responded that he did not. At about this time, Officer Driskell received notice on his police radio that there was an outstanding warrant for Mr. Rose for DUI and that Mr. Rose had a long criminal record. Officer Driskell then told Mr. Rose that he was arresting him pursuant to the outstanding warrant and for driving

without the necessary papers. Officer Driskell proceeded to read Mr. Rose his Miranda warnings. Shortly thereafter, the other officers returned from the restaurant, and after conferring with them, Officer Driskell told Mr. Rose he was also being arrested for domestic violence.

Mr. Rose then told Officer Driskell he had some very valuable things in his car and asked if he could drive the car himself to the police station. Officer Driskell responded that he could not allow Mr. Rose to drive because he did not have the papers he was required by law to carry when driving.

Mr. Rose then suggested that Ms. White drive his car home, and he handed the keys to Officer Driskell to deliver to Ms. White inside the restaurant. Officer Driskell took the keys inside, but after speaking with Ms. White, he determined that she

appeared intoxicated and too upset from the recent argument to drive safely. Officer Driskell returned to tell Mr. Rose that he could not allow Ms. White to drive in her condition. Officer Driskell said that the police would tow and impound the car.

Mr. Rose then became very excited and exclaimed again that he had valuable things in the car. He also threatened to sue Officer Driskell if anything was taken from his car.

Officer Driskell then drove his patrol car back to Mr. Rose's car, and, together with the other officers at the scene, conducted an inventory of the car's contents prior to impounding it. Among the items found in the passenger compartment were two microwave ovens. In the trunk, the officers discovered bags of cocaine, firearms, and certain papers that the government believes relate to criminal

activity. The officers recorded all of the items found in the car, incriminating and mundane, on an inventory-list of the car's contents.

Discussion

The Supreme Court has long held that police may inventory the contents of a lawfully impounded automobile. See South Dakota v. Opperman, 428 U.S. 364, 372-76, 96 S.Ct. 3092, 3098-3100, 49 L.Ed.2d 1000, 1007-09 (1976). Among the justifications for allowing inventory searches are: 1) the protection of the owner's property while it remains in police custody; 2) the protection of the police against claims or disputes over lost or stolen property; and 3) the protection of the police from potential danger emanating from the seized vehicle. Id. at 369, 96 S.Ct. at 3097, 49 L.Ed.2d at 1005.

In this case, however, the defendant

does not challenge the right of the police to conduct an inventory search of his car once it was seized.[1] Rather, the defendant argues that the impoundment itself was illegal under the Fourth Amendment and that the items discovered during the inventory were all tainted by the illegal seizure of the car.

The defendant rests his Fourth Amendment challenge on two theories. First, he contends that the impoundment was not made in accordance with standard Metropolitan Police procedures. Second, he asserts that prior to impounding an automobile, the police must inform the driver of all the alternatives to impoundment and allow the driver to choose

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[1] The defendant, at the suppression hearing, specifically conceded that the inventory search itself was properly conducted.

the one he prefers. The Court disagrees.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

"The ultimate standard set forth in the Fourth Amendment is reasonableness." Cady v. Dombrowski, 413 U.S. 433, 439, 93 S.Ct. 2523, 2527, 37 L.Ed.2d 706, 713 (1973). The Fourth Amendment does not prohibit all searches and seizures, only unreasonable ones. Generally, the Supreme Court has held that seizures of private property conducted without a warrant are per se unreasonable. Id. However, one of the few exceptions to this general rule arises in the case of automobiles. Id.

"Although vehicles are 'effects' within the meaning of the Fourth Amendment, 'for purposes of the Fourth Amendment there is a constitutional difference between houses and cars.'" Id. (quoting Chambers v. Maroney, 399 U.S. 42, 52, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970)).

The justification of this relaxed Fourth Amendment posture regarding automobiles arises partly out of the fact that one has a "lesser expectation of privacy in a motor vehicle." Opperman, 428 U.S. at 368, 96 S.Ct. at 3096, 49 L.Ed.2d at 1005 (quoting Cardell v. Lewis, 417 U.S. 583, 590, 41 L.Ed.2d 325, 94 S.Ct. 2464 (1974)). Also, the inherent mobility of automobiles routinely creates exigent circumstances making rigorous enforcement of the warrant requirement impossible. Id. at 367, 96 S.Ct. at 3096, 49 L.Ed.2d at 1004 (citing Carrol v. United States, 267

U.S. 132, 153-54, 45 S.Ct. 280, 69 L.Ed. 543 (1925); Coolidge v. New Hampshire, 403 U.S. 443, 459-60, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)). Yet a third justification for the warrantless seizure of automobiles stems from the sheer ubiquity of the vehicles and the constant contact that local police must have with them and their drivers. See Cady, 413 U.S. at 441-42, 93 S.Ct. at 2528, 37 L.Ed.2d at 714-15. Recognizing the practical necessity of enabling police to impound automobiles that violate parking ordinances, impede the flow of traffic, or threaten public safety and convenience, the Court has allowed police to seize automobiles without a warrant pursuant to what the Court has called their "community caretaking functions." Opperman, 428 U.S. at 368, 96 S.Ct. at 3097, 49 L.Ed.2d at 1005 (quoting Cady, 443 U.S. at 441, 93 S.Ct. at 2528, 37 L.Ed.2d

at 715).

The community caretaking function is "totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute." Cady, 443 U.S. at 441, 93 S.Ct. at 2528, 37 L.Ed.2d at 715. As such, it is not held to the rigorous standards of probable cause or the warrant requirement. See Colorado v. Bertine, 479 U.S. 367, 371, 107 S.Ct. 738, 741, 93 L.Ed.2d 739, 745 (1987); Opperman, 428 U.S. at 370 n.5, 96 S.Ct. at 3097 n.5, 49 L.Ed.2d at 1006 n.5. Rather, the Supreme Court has only required that the exercise of the community caretaking function meet the Fourth Amendment requirement of "reasonableness." See Cady, 413 U.S. at 448, 93 S.Ct. at 2531, 37 L.Ed.2d at 718.

Of course, there is an obvious danger in foregoing the requirement that a search

or seizure not be authorized first by a neutral and detached magistrate, for the magistrate's notion of reasonableness may be quite different from that of a policeman on the street, particularly when the policeman is dealing with the aggravation attendant to automobiles and traffic. C.f. Opperman, 428 U.S. at 383, 96 S.Ct. at 3104, 49 L.Ed.2d at 1013 (concurring opinion of Justice Powell). Thus, the Supreme Court has always required that the impoundment of automobiles and the subsequent inventorying of their contents be conducted "in accordance with standard procedures in the local police department, a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function." Opperman, 428 U.S. at 375, 96 S.Ct. at 3100, 49 L.Ed.2d at 1008 (emphasis in original).

Mr. Rose's first argument is that the standard procedures of the Metropolitan Police Department did not permit Officer Driskell to impound his car under the circumstances that existed on the night of February 20, 1991. Thus, it is necessary to examine the actual procedures that were in effect at that time. They are set forth in General Order No. 83-2 of the Metropolitan Police Department, which provides:

> It shall be the policy of the Department that if impoundment of a vehicle is not absolutely necessary to expedite a member's enforcement/investigative action[,] it shall not be impounded. To the contrary, if the circumstances which bring the vehicle to the attention of the member in the first place are such that the owner/operator, even though arrested, is able to make his own "arrangements" for custody of the vehicle, or if the vehicle can be parked and locked without obstructing traffic or endangering the public, the member shall permit such action to be taken rather than impound

> the vehicle. Any "alternative" to impoundment will require completion of MPD Form 233 "Vehicle No-Tow Request & Liability Release Report", which must be signed by the owner/operator of the vehicle.

Def. Exhibit No. 7 to Motion to Suppress (entered November 24, 1992) (emphasis in original). The MPD Form 233, referred to above, provides two blanks that a driver may check off, indicating how he would like the police to dispose of his car, followed by a release from liability. The form reads, in relevant part, as follows:

> I, THE UNDERSIGNED, REQUEST THAT THE VEHICLE NOT BE REMOVED TO THE METROPOLITAN TOW-IN LOT FOR SAFEKEEPING. INSTEAD, AS THE OWNER AND/OR OPERATOR OF THE VEHICLE, I DO HEREBY AUTHORIZE/REQUEST THAT THE VEHICLE BE:
>
> ____ (1) left parked/secured at the location where the police action occurred, wherein I will be responsible for its safekeeping;
>
> ____ (2) remanded to the custody of _____, wherein he/she

> will be responsible for its safekeeping;
>
> . . .
>
> IN CONSIDERATION FOR COMPLIANCE WITH THE ABOVE REQUEST, I HEREBY RELEASE THE METROPOLITAN GOVERNMENT AND MEMBER(s) OF THE METROPOLITAN POLICE DEPARTMENT FROM ANY LIABILITY FOR LOSS OF, OR DAMAGE TO, THE VEHICLE AND PROPERTY THEREIN.

Def. Exhibit No. 7 to Motion to Suppress.

The standard procedures of the Metropolitan Police Department were utterly useless to Officer Driskell on the night of February 20, 1991. Although the General Order instructed him not to tow automobiles that were not "obstructing traffic or endangering the public," it said nothing about what to do when the driver alerted the police to the presence of valuables in the car and threatened to sue them if anything was stolen from the car, as Mr. Rose had done. Furthermore, Officer Driskell testified at the suppression

hearing that there was considerable crime in the neighborhood where he had stopped Mr. Rose's car and the risk of vandals breaking into it was significant.

Option "(1)" on the Form 233 was not feasible. Mr. Rose indicated he did not want the car left on the lot when he asked if he could drive it to the police station or let Ms. White drive it home. Moreover, Mr. Rose hardly seemed prepared to sign the required release from liability after he already threatened to sue the police if anything was taken from his car.

Option "(2)" was also unfeasible. Officer Driskell indulged Mr. Rose's request that Ms. White be allowed to drive the car home. However, after carrying the keys inside the restaurant and speaking with her, Officer Driskell determined that she was too intoxicated and upset to drive safely. After Officer Driskell informed

Mr. Rose that Ms. White was unable to drive, Mr. Rose did not suggest another driver.

Faced with the situation at hand, Officer Driskell complied with the Fourth Amendment by reasonably impounding the car for safekeeping. As the First Circuit Court of Appeals recently said:

> Virtually by definition, the need for police to function as community caretakers arises fortuitously, when unexpected circumstances present some transient hazard which must be dealt with on the spot. The police cannot sensibly be expected to have developed, in advance, standard protocols running the entire gamut of possible eventualities. Rather, they must be free to follow "sound police procedure," Cady, 413 U.S. at 447, 93 S.Ct. at 2531, 37 L.Ed.2d at 718, that is, to choose freely among the available options, so long as the option chosen is within the universe of reasonable choices. Where, as here, the police have solid noninvestigatory reasons for impounding a car, there is no need to show that they followed explicit criteria in deciding to

> impound, as long as the decision was reasonable.

U.S. v. Rodrigues-Morales, 929 F.2d 780, 787 (1st Cir. 1991), cert. denied, _____ U.S. _____, 112 S.Ct. 868, 116 L.Ed.2d 774 (1992) (footnote and citation omitted).

In Collins v. Nagle, 892 F.2d 489 (6th Cir. 1989), the Sixth Circuit Court of Appeals used a similar analysis to determine whether impounding a vehicle violated the Fourth Amendment. The court said:

> To determine whether the mining investigators conducted the seizure in violation of the fourth amendment, we must examine the facts and circumstances surrounding the impoundment of [the] truck. See Cooper v. California, 386 U.S. 58, 59, 87 S.Ct. 788, 789, 17 L.Ed.2d 730 (1967). Such an inquiry does not require a determination of whether there was a need to impound the truck; instead we are required to determine whether the mining investigators' decision to impound was reasonable under the circumstances.

Id. at 493-94 (citations omitted).

The Court finds that the impoundment of Mr. Rose's car was reasonable under the circumstances and, therefore, did not violate the Fourth Amendment. To find otherwise would be to turn the Fourth Amendment on its head--instead of requiring the police to act reasonably, it would require them to act foolishly by abandoning a car where it was subject to vandalism and theft after the driver had told them there were valuables inside and threatened to sue them if anything was taken. Officer Driskell's impoundment of Mr. Rose's car for safekeeing was reasonable under the circumstances and, therefore, in compliance with the Fourth Amendment. See United States v. Staller, 616 F.2d 1284, 1289-90 (5th Cir. 1980), cert. denied, 449 U.S. 869, 101 S.Ct. 207, 66 L.Ed.2d 89 (1980) (holding that police may remove car from

shopping mall parking lot pursuant to community caretaking function where there is appreciable risk of theft of vandalism).

Mr. Rose's second argument, that the Fourth Amendment required the police to inform him of alternatives to impoundment, such as telephoning a friend who could pick up the car, is entirely lacking in merit. Addressing a similar argument in Colorado v. Bertine, 479 U.S. 367, 93 L.Ed.2d 739, 107 S.Ct. 738 (1986), the Supreme Court said:

> And while giving Bertine an opportunity to make alternative arrangements would undoubtedly have been possible, we said in Lafayette:
>
> > "The real question is not what 'could have been achieved,' but whether the Fourth Amendment requires such steps . . .
> >
> > "The reasonableness of any particular governmental activity does not necessarily

> turn on the existence of alternative 'less intrusive' means."

Id. at 373-74, 107 S.Ct. at 742, 93 L.Ed.2d at 747 (quoting Illinois v. Lafayette, 462 U.S. 640, 647, 77 L.Ed.2d 65, 103 S.Ct. 2605 (1983)) (emphasis in original). See also Sammons v. Taylor, 967 F.2d 1533, 1540-43 (11th Cir. 1992); U.S. v. Walker, 931 F.2d 1066, 1069 (5th Cir. 1991).

## Conclusion

For the reasons stated above, the defendant's motion to suppress shall be denied.

An appropriate order shall be entered.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge
12-4-92/